

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

July 12, 2016

David R. Anderson, PE | President/CEO
American Rail Engineers
18 Technology Drive, Suite 208
Irvine CA 92618

SUBJECT: Violation 1 - Unauthorized reconstruction of a washed out road and
Violation 2 – Unauthorized installation of bridge automation equipment,
in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east
of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in
Novato, Marin County (Enforcement File No. ER2016.017)

Dear Mr. Anderson,

On May 23, 2016, I sent a letter to Gregg Jennings at SMART and Mitch Stogner at NCRA, a copy of which is attached, stating that BCDP had become aware that a retaining wall had been constructed in a tidally influenced marsh channel west of the Petaluma River near the Black Point Bridge in Novato, Marin County, and that the responsible party should either remove or obtain permission for this unauthorized work. I also stated that the bridge automation project, which you stated had not yet occurred, was subject to the requirement to obtain a Commission permit.

This letter is addressed exclusively to NCRA because in a letter to me, dated June 28, 2016, John Riley, Project Engineer, SMART, states that the section of rail line subject to this enforcement action, known as the Lombard Segment, is under the exclusive control of NCRA pursuant to the terms of an operating agreement between SMART and NCRA. As part of a forthcoming application to legalize this work, it will be necessary to submit documentation of the boundaries of the area that is within the control of NCRA.

Violation 1 – Road Repair. By e-mail dated May 28, 2016, you submitted a photograph of the project and simple project description from Jacob Park, Manager of NWP Company. You stated that NWP Company is NCRA's Freight Operator responsible for railroad maintenance. Mr. Park described the project as follows: "The top two timbers were put back into place and the road was raised back to original height with five tons of dirt. We never touched the culvert. If we did not make the repair, the road would have eroded away and dammed the culvert and no water would be flowing through the culvert." The undated photograph was taken looking at the east face of the "headwall" and depicts a backhoe releasing gravel onto the road surface. It is annotated to state "[t]op two headwall timbers replaced" and "5 tons of fill placed on Harbor Drive."

On May 31, 2016, I e-mailed you a response asking for additional information, such as photographs of the site prior to the project and during other tidal phases; the date and time of the photograph I received on May 28th, so I could determine the tidal elevation shown in the photograph; a description of the location of the culvert; and suggested that it might be useful to speak directly with Mr. Parks. In an e-mail dated May 31st, you informed me that you had not yet located any other photographs, that you would contact Mr. Parks to see if he could join us in a telephone conversation, and also ask him for the date of the photograph that he provided to you that you provided to me. Finally, you stated that the culvert is located below the bottom plank. To date, you have not submitted any additional photographs, any further project description, or an application requesting after-the-fact authorization for the project.

Later in the day on May 31st, we spoke by telephone. During our conversation, I advised you, as stated in the May 23rd letter, that the road repair is subject to the requirement to obtain a permit from BCDC. I explained some of the critical information required to enable BCDC to analyze the project such as, but not limited to, the identification of the edge of the Bay, which includes the marshlands lying between mean high tide and 5 feet above mean sea level, pursuant to Section 66610 of the McAteer-Petris Act.

At this location, the closest tidal station is entitled, "Petaluma River Entrance, S.P. Bay," also known as NOAA Station ID#9415252. Mean sea level at this location is available in three tidal datums, any one of which you may choose to use: 3.47 feet in NAVD 88 datum, 0.66 feet in on NGVD 29 datum and 3.28 feet on MLLW datum. Therefore, where marshlands are present, such as the location of this enforcement action, the edge of the Bay is located at 8.47 feet in NAVD 88 datum, 5.66 feet in on NGVD 29 datum and 8.28 feet on MLLW datum. The 100-foot shoreline band is exactly 100 feet parallel to and inland of the edge of the Bay. You must hire a surveyor to map this critical information.

On June 24, 2016, I conducted a site visit to familiarize myself with the existing conditions, and to attempt to gain an understanding of the conditions that existed prior to your undertaking the project in March. We had arranged to meet, but unfortunately we had a misunderstanding about the meeting time and missed each other. I am sorry to have missed meeting you, and I apologize that my e-mail caused confusion about the meeting time.

It was very helpful to observe the project and surrounding area. I was also able to speak to a resident who explained what the conditions were like before the recent project occurred. However, I was unable to observe a culvert under the road, as there was a pool of water on both sides of the road.

Based on my observations and the information obtained from speaking to the resident, I remain concerned that the project may be having an adverse impact on the tidal marsh, which means it may not be approvable as built. However, I will refrain from drawing a conclusion absent an application and the requisite supporting documentation. It appears that the surface

grade of the road was lower prior to the March 2016 repair. It also appears that at the lower elevation, two daily high tides entered the marsh behind the road. It now appears that this twice daily tidal flooding cannot occur.

To reiterate what I stated in the May 23rd letter to Mr. Stogner and Mr. Jennings, NCRA should proceed with the preparation of an application for the project (or with the removal of the unauthorized fill). The application must describe the pre-existing conditions with special emphasis on the past and present extent of the twice-daily tides that flow throughout the slough channel and marsh, including via surface flows that the project appears to have eliminated by elevating the road height. The application must address the purpose of the project, why it is necessary, whether it minimizes fill, how it has affected the local hydrology, and how it impacts the tidal marsh. I advise you to hire a wetland biologist and a hydrologist to assist you in completing the application. A technical description of the habitat on both sides of the road in the slough channel and how the project is or is not impacting that habitat will be necessary for the BCDC staff to fully analyze this project. You can download a copy of our permit application from our website at www.bcdc.ca.gov in the Permits section under Forms and Fees. Several sections of our regulations that can assist you in preparing a comprehensive application package are attached to my May 23rd letter, a copy of which is enclosed.

The 35-day grace period to resolve this violation without incurring standardized fines expired on June 27, 2016. Standardized fines will continue to accrue until NCRA has fully resolved this violation either by legalizing or removing this unauthorized project. Please note, the submission of a permit application will not pause or stop the fine clock. That will occur upon submitting a fillable application for, and obtaining a permit to legalize, all of the unauthorized work or removing the unauthorized work or a combination of both.

Violation 2 – Bridge Automation Project. The resident with whom I spoke on June 24th told me that the automation project has been completed. I observed an apparently new metal box at the southeast end of the trestle supported by a steel piling located in the Bay. If this metal box supported by a steel piling contains the automation equipment, together they constitute unauthorized fill in our Bay jurisdiction and a second violation of the McAteer-Petris Act. Adding to my concern that NCRA has conducted this and other work in our jurisdictions is the statement made by you in a letter to Milford Wayne, State Historic Preservation Office, dated May 10, 2010, that “[t]he NCRA has been actively rehabilitating the rail line between Lombard and Windsor. A project within the over rehabilitation is related to the Black Point Bridge...” Later in the same letter, you state, “Planned repairs to the bridge would modify and replace the mechanical and electrical systems of the swing span in order to automate the bridge. ... No work will be performed in the water or from the water; all work will be performed on the bridge using rail access.” Based on my observations, appears this statement may not be accurate.

Dave Anderson

July 12, 2016

Page 4

As already directed in the May 23rd letter, you must obtain the Commission's authorization for this project. The application must include a comprehensive description of what this installation entailed, including the date the work occurred, among other information required by the application.

You have 35 days to resolve this second violation without accruing any standardized fines, which are explained in the attached Appendix of Standardized Fines and Enforcement Options. Thereafter, the NCRA will be subject to standardized fines, which will continue to accrue until you have resolved this violation by: (1) submitting a fileable application to BCDC and obtaining retroactive authorization for the as-built automation equipment; or (2) removing the unauthorized fill from our jurisdiction.

We look forward to assisting you in obtaining the necessary permit(s) and resolving the enforcement matters. Please contact me if you have any questions, and please let me know whether you are working on an application and when I might expect to receive it. You can reach me by telephone by calling 415/352-3609 or by e-mail at adrienne.klein@bcdca.gov.

Sincerely,



ADRIENNE KLEIN
Chief of Enforcement

Enc. – Copy of letter dated May 23, 2016 and its attachments

cc: Marin County Code Enforcement Office
Nicholas LaVoie, State Lands Commission

APPENDIX

Standardized Fines and Enforcement Options for Violation 2 – Unauthorized Bridge Automation Project

Regulation 11386(e)(4) For the failure to obtain a Commission permit prior to undertaking any activity that can be authorized by an administrative permit.

Enforcement Options. Pursuant to section 11386 of the BCDC's administrative regulations, you may resolve the penalty portion of the alleged violation by paying the standardized fines described below or you have the option to seek resolution through a formal enforcement proceeding that would involve a public hearing. If any of your actions are determined to be knowing and intentional violations or violate a term of a cease and desist order, the law (sections 66641.5(c) and 66641 of the McAteer-Petris Act, respectively) provides that we may refer this matter to the Office of the Attorney General, which could subject you to significant court imposed penalties.

Standardized Fines for Violation 2 – Unauthorized Bridge Automation Project. If the alleged violation is fully corrected within 35 days of the date of this letter, no civil penalty will apply. If a fileable application is submitted between 36 and 65 days and a permit is obtained within 155 days after the date of the mailing of this letter or the unauthorized activity is completely corrected between 36 and 65 days, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$2,000. If a fileable application is submitted between 66 and 95 days and a permit is obtained within 185 days after the date of the mailing of this letter or the unauthorized activity is completely corrected between 66 and 95 days, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$5,000. If a fileable application is submitted or the unauthorized activity is completely corrected more than 95 days after the date of the mailing of this letter, you may resolve the penalty portion of the alleged violation by paying a standardized fine of \$5,000 plus \$100 per day from the 96th day to the date a permit is obtained or the unauthorized activity is completely corrected.

Cease and Desist and Civil Penalty Order. If you have not obtained the Commission's authorization or corrected the alleged violation within 125 days of the date of this letter, you may no longer have the option to settle this matter with standardized fines and we may, pursuant to sections 66638 and 66641.5(e) of the McAteer-Petris Act, commence a formal enforcement proceeding that could lead to the issuance of a cease and desist and civil penalty order with an administratively imposed civil penalty of between \$10 and \$2,000 per day up to a maximum of \$30,000 per alleged violation.

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

May 23, 2016

Mitch Stogner, Executive Director
North Coast Rail Authority (NCRA)
419 Talmage Road, Suite M
Ukiah CA 95482

Gregg Jennings
Sonoma Marin Area Rapid Transit (SMART) District Office
5401 Old Redwood Highway, Suite 200
Petaluma, CA 94954

SUBJECT: Unauthorized reconstruction of a washed out road in the Petaluma River, in SF Bay, located west of the Black Point Bridge and east of Grandview Avenue (which intersects with Beattie Avenue and Harbor Drive) in Novato, Marin County (Enforcement File No. ER2016.017)

Dear Messrs. Stogner and Jennings,

On March 29, 2016, a member of the public informed BCDC that a retaining wall had been constructed in a tidally influenced marsh channel west of the Petaluma River near the Black Point Bridge in Novato, Marin County. On March 30, 2016, I contacted SMART to obtain further information and was directed by Yasmin Mora to Gregg Jennings with whom I spoke by telephone on April 11, 2016, and was, thereafter, able to locate the attached Google Earth image of the project site, dated April 1, 2015, shown at two different scales.

Unauthorized Work in SF Bay. During our conversation, Mr. Jennings informed me that the section of road that crosses the waterway had washed out and was replaced with earthen fill, a retaining wall and culvert, by the North Coast Rail Authority pursuant to an operating agreement that it holds with SMART. I informed Mr. Jennings that this work constitutes the placement of fill within an area subject to the jurisdiction of the McAteer-Petris Act and requires the Commission's review and approval to remain in place.

Mr. Jennings stated that he believed the NCRA was exempt from the requirements of the MPA. After conferring with our legal staff, I emailed Mr. Jennings on April 12, 2016, and informed him that neither the NCRA nor the project are exempt from our jurisdiction and, as such, SMART (or the NCRA) should complete the BCDC permit application available on our website (<http://www.bcdc.ca.gov/permits/>) and provide the requisite accompanying

Mitch Stogner and Gregg Jennings

May 23, 2016

Page 3

performed in the water or from the water, all work will be performed on the bridge using rail access. The construction activities for...the proposed project will involve mechanical and electrical system improvements to the bridge allowing [it] to be operated from the...approach spans."

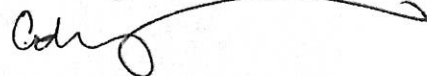
On April 14, 2016, Mr. Jennings also submitted a letter from David Anderson, NCRA Project Engineer, to Milford Wayne Donaldson, State Historic Preservation Office (SHPO), dated May 10, 2010, providing notification of the Black Point Bridge Automation Project. NCRA's letter to SHPO states that

"[p]lanned repairs to the bridge would modify and replace mechanical and electrical systems of the swing span in order to automate the bridge. This would eliminate the need for rail workers to navigate the channel and would instead allow the bridge to be operated from the bridge approach spans on the land. No work will be performed in the water or from the water; all work will be performed on the bridge using rail access...All improvements will involve internal wiring within the existing operator house, and will not be visible from outside of the bridge house, thus preserving the historical and architectural value of this nearly 100 year old bridge."

While BCDC fully supports this project, it is subject to the requirement to obtain a permit from BCDC, as I stated in my email dated April 14, 2016. I recommend that you submit one joint application for the proposed and unauthorized work described in this letter and any other work that may have occurred or is planned in the river channel, in any tidally-influenced area and within 100 feet of any tidal waters of SF Bay.

We look forward to assisting you in obtaining the necessary permit/s and resolving the enforcement matter. You can reach me by telephone by calling 415/352-3609 or by email at adrienne.klein@bcdc.ca.gov.

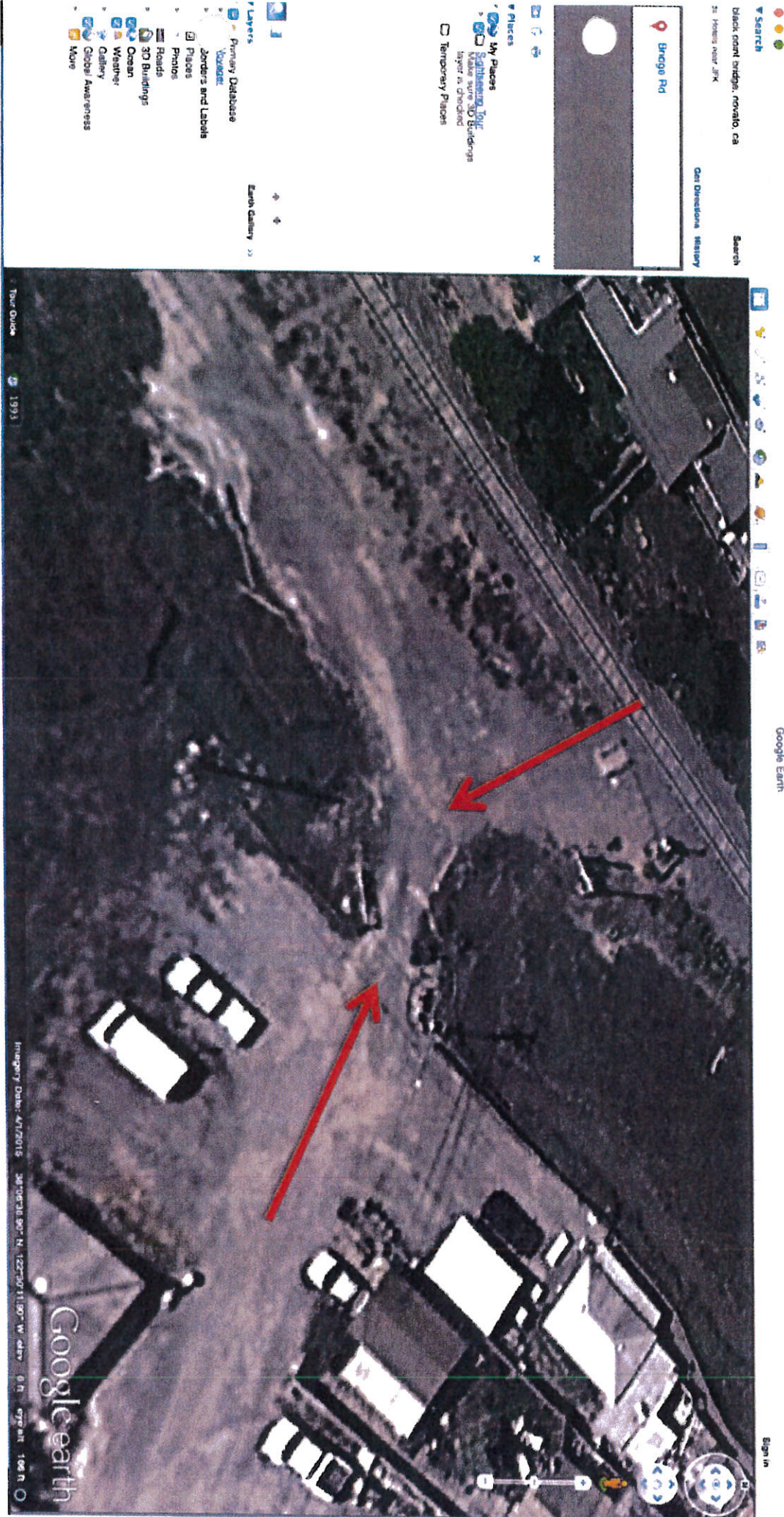
Sincerely,



ADRIENNE KLEIN
Chief of Enforcement

Enclosures: 1. Google Earth image at two scales; 2. Appendix F, Application Exhibits (Proof of Legal Interest, Plans and Maps, and Environmental Documentation); 3. Appendix M, Commission Permit Application Fees; and 4. Appendix of Standardized Fines and Enforcement Options

cc: Marin County Code Enforcement Office
Judy Arnold, SMART Board Member and Chair, Marin County Board of Supervisors



→ ← Location of Road Repair

In addition to providing a large scale project site plan, applicants for major projects must also provide eight high quality copies of an 8-1/2" x 11" reduction of the site plan. Applicants for minor repairs or improvements or routine maintenance projects or for projects authorized by a regionwide permit need to provide only one high quality 8-1/2" x 11" reduction of the project site plan.

In some cases, instead of providing high quality 8-1/2" x 11" reductions that are suitable for reproduction, applicants may furnish 235 copies of exhibits of another size. Applicants should consult with the Commission's staff to determine if this option is appropriate.

Environmental Documentation

The California Environmental Quality Act and the National Environmental Policy Act

The California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) require that the environmental impacts of a proposed development be assessed before any permit is granted for the project. These laws include specific exemptions for activities that have insignificant environmental impacts. If the project is covered by one of these exemptions, a brief statement must be provided to document this statutory exemption and cite the statutory section exempting the project. If available, this statement should be the environmental determination by the lead agency.

Similarly, other activities fall within categories that do not require the preparation of environmental impact documentation. If the project is covered by one of these exemptions, a statement must be provided to document this categorical exemption and cite the regulation section exempting the project. If available, this statement should be the environmental determination by the lead agency.

If another government agency has certified a "negative declaration" on the project, a copy of the declaration prepared in accordance with NEPA must be included with the application, and a copy of the declaration prepared in accordance with CEQA may be included with the application.

If the project requires the preparation of an environmental impact document to comply with NEPA, the document certified by the lead agency must be included with the application. If the document is longer than ten pages, a summary of the document not longer than ten pages must be included with an application for a major project.

If the project requires the preparation of an environmental impact document to comply with CEQA, the lead agency's certification and the document may be included with the application. If the document is longer than ten pages, a summary of the document not longer than ten pages must be included with an application for a major project. Note that when the certification and document are not submitted with the application, they must be submitted before the Commission considers and takes action on the application; see Sections 10516 and 10625.

Other Environmental Documentation. If any species that is affected by the project is known to be threatened or endangered, or if the California Department of Fish and Game or a federal wildlife agency has determined that a species is a candidate for listing as threatened or endangered, or if any species provides substantial public benefits, provide with the application the results of any consultation on the special status species that is required by federal and state endangered species acts.

If the project will likely result in a "take" of any special-status species under federal or state endangered species laws, provide a copy of the "take authorization".

Provide any required water quality certification or waiver or water quality discharge requirements from the San Francisco Bay Regional Water Quality Control Board.

NOTE: Authority cited: Sections 66632, Government Code; and Section 29201(e), Public Resources Code. Reference: Sections 65940-65942, 66605, 66632(b) and (f) and 84308, Government Code; Sections 2770, 2774, 21080.5, 21082, 21160 and 29520, Public Resources Code; and the San Francisco Bay Plan.

HISTORY

1. New Appendix F filed 5-18-87; operative 6-17-87 (Register 87, No. 30).
2. Amendment filed 4-18-90; operative 5-18-90 (Register 90, No. 18).
3. Amendment of Environmental Documentation section filed 1-26-98; operative 2-25-98 (Register 98, No. 5).
4. Amendment filed 9-11-2008; operative 10-11-2008 (Register 2008, No. 37).

trative listing for the application. No refund shall be made for an administrative permit application after listing.

(2) For all other fees, the first \$200 hundred dollars is not refundable and the remainder shall be refunded if the application is withdrawn prior to mailing notice of a public hearing either on whether the application is complete or on whether the project is consistent with the applicable Commission policies but shall not be refunded after the notice of the public hearing has been mailed.

(h) Fees in Special Circumstances.

(1) The fee for resubmitting an application that had earlier been denied by the Commission or withdrawn by the applicant before a Commission vote shall be seventy-five percent (75%) of the fee that would be charged for a new application covering the same work. Such fee shall be in addition to the fee charged for the original application.

(i) Fees for Applications Arising from an Enforcement Investigation.

(1) The Commission shall double all relevant application fees if the Executive Director determines that the applicant submitted the application in response to an investigation by the staff or the Commission of a possible violation of the McAteer-Petris Act, the Suisun Marsh Preservation Act, or the terms or conditions of a permit.

(2) Applications shall be presumed to have arisen out of an enforce-

ment investigation if the staff prepared a written enforcement report prior to the applicant presenting the application for filing.

(j) Appeal of Fee Determination.

(1) Any person who believes a fee charged is not correct under these regulations may appeal to the Commission any objection that the applicant, the Executive Director, and the Chair cannot resolve.

(2) Pending resolution of the amount of the fee, the applicant shall pay the fee that the Executive Director assesses and shall file a letter explaining why the fee is incorrect.

(3) When an applicant appeals a fee, the Commission shall determine the correct fee at the time it votes on the application or at the time for commenting on the administrative listing, whichever applies.

NOTE: Authority cited: Section 66632(f), Government Code; and Section 29201(e), Public Resources Code. Reference: Section 66632(b) and (c), Government Code; and Section 29520(b), Public Resources Code.

HISTORY

1. New Appendix M (combination and amendment of former section 10330-10338) filed 11-20-91; operative 12-20-91 (Register 92, No. 8).
2. Amendment of Appendix M and amendment of NOTE filed 10-14-2004; operative 10-14-2004 pursuant to Government Code section 11343.4 (Register 2004, No. 42).
3. Amendment of Appendix M and NOTE filed 12-11-2008; operative 1-10-2009 (Register 2008, No. 50).